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In the Supreme Court of the United States

OCTOBER TERM, 1955

No.....

FRANK A. HAFFA, Petitioner

vs.

STATE OF IOWA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

The Petitioner prays that a writ of Certiorari issue to review the judgement of the Supreme Court of the State of Iowa entered in the above entitled case on June 7, 1955.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of the State of Iowa is printed in Appendix B hereto, infra, p. 11 and is reported in 71 N.W. 2d 35.

JURISDICTION

The judgement of the Supreme Court of the State of Iowa was entered on June 7, 1955. Rehearing was denied on the 27th day of July, 1955. The jurisdiction of this court is invoked under 28 U.S.C. 1254, Section 3.

QUESTIONS PRESENTED

Whether wilful, repeated and unfounded allegations and insinuations of previous unlawful and dereogatory acts of the defendant in questions propounded to the defendant on cross examination by the prosecuting attorney in trial of

the case constituted a denial of due process of law in violation of the 5th and 14th Amendments of the Constitution of the United States.

STATUTES INVOLVED

The statutory provisions involved are the Fifth and Fourteenth Amendments to the Constitution of the United States, Section 10, Article 1, Constitution of the State of Iowa, and Section 793.15, Code of Iowa.

STATEMENT

July 9, 1953, the Petitioner was indicted by the Grand Jury of Black Hawk County, Iowa, for murder in the first degree, being accused of shooting and killing one Arvey C. Leeper. The Petitioner was tried before a jury in the District Court of State of Iowa in and for Black Hawk County, and on October 9, 1953, was found guilty of manslaughter. Petitioner's motion for a new trial was denied and his exceptions to the Court's instructions to the Jury were overruled. November 25, 1953, the Court sentenced the petitioner to imprisonment in the Iowa State Penitentiary at Fort Madison, Iowa, for not to exceed eight (8) years and to pay a fine of $1000.00 and the costs of prosecution.

The petitioner appealed to the Supreme Court of the State of Iowa. The judgement and sentence appealed from was affirmed by said Court in a written opinion filed June 7, 1955 and reported in 71NW 2nd Series 35, and in Appendix B, infra, pp. 11 to 29. Petition for rehearing was denied on July 27, 1955.

At the time of trial, the petitioner was a retired dentist, seventy-two (72) years of age. He was and had been for a number of years prior thereto the business manager of a large apartment house in Waterloo, Iowa. His home was in Castle Hill, about a fifteen (15) minute drive by automobile from the apartment house.

Prior to June 6, 1953, there were numerous acts of vandalism on petitioner's 5-acre tract on which his house and a number of other buildings were located. On one occasion, a lock was torn from an outside building, and on another, a rock was thrown through a window of his house. Those depredations were reported to the sheriff, who made numerous investigations, but always when the officers arrived the vandals had gone and no evidence to identify them was discovered. The sheriff instructed the petitioner how to cope with the situation and gave the petitioner's wife a gun for protection. On the night of the shooting, the petitioner's wife received an anonymous phone call from a man who threatened to enter the home. The petitioner immediately drove from the apartment house to his residence in Castle Hill. After visiting briefly with his wife, he went to his car, took a gun from the glove compartment thereof and began an inspection of the 5-acre tract and the buildings located thereon. While doing so, his attention was attracted by the dome light on a taxi cab which stopped briefly on the highway about one hundred fifty feet distant from the petitioner's house. Soon after, he heard a kicking and pounding at the east door of his residence and afterwards at the south and main entrance thereto. Petitioner fired a warning shot into the ground and called upon the decedent to stop and come down off the porch. The decedent continued his attempt to force entrance to the petitioner's home and petitioner fired two more shots into the entrance way where decedent was standing. They did not strike the decedent, who thereupon came toward and threatened to harm the petitioner. Petitioner then fired the final shot which struck the decedent in the shoulder and caused his death. During all of this time, the petitioner's wife was in the house.

The petitioner claimed he was acting in self defense. He was the only eye witness.

On cross examination of the petitioner by the Prosecuting Attorney, the Prosecuting Attorney's questions, the petitioner's objections and Court's rulings thereon were as follows:

Q. Did you engage in any bootlegging at any time?

A. No, sir.

MR. W. L. BEECHER: Objected to as immaterial, irrelevant and incompetent, highly prejudicial to ask the question.

MR. TRAVIS: And improper cross-examination.

THE COURT: Overruled.

MR. W. L. BEECHER: We withdraw the objection.

THE COURT: Withdraw the ruling. (Appellee's Brief and Argument, p. 107, lines 26 to 35, abst. of record, p. 161, lines 32 to 33)

Q. I believe you told us what you used those buildings for on the place, Doctor Haffa. Will you tell us again what that was that you used your buildings for?

A. Storage.

Q. Isn't it a fact you used one of those buildings for a still?

MR. W. L. BEECHER: We object to that on the ground it is immaterial, irrelevant and incompetent, highly prejudicial and a deliberate attempt on the part of the State to inject in this case evidence that is prejudicial.

MR. HOLMES: He testified about the use of his buildings.

THE COURT: Sustained. (Abst. page 161, line 35, abst. p. 162, lines 1 to 20)

Q. You said you owned a cottage in Casebeer Heights, is that correct?

A. Yes, sir.

Q. Do you recall that cottage being raided by state agents?

MR. W. L. BEECHER: Objected to as immaterial, irrelevant and incompetent, trying to prejudice the rights of the defendant in this case.

THE COURT: Sustained.

MR. W. L. BEECHER: And we request, Your Honor, that the State should be cautioned not to continue to ask questions of that nature on the ground they are highly prejudicial, no foundation or fact for them.

THE COURT: The State will keep in mind the purpose of the cross examination of the juror—or the defendant. (Abst. page 163, lines 21 to 35, abst. p. 164, lines 1 to 10)

Paragraph 6 of the petitioner's motion for a new trial appears in full in Appendix C infra, pp. 30 to 32. Subdivision 1 of said paragraph 6 is as follows:

> 6. That the defendant has not received a fair and impartial trial for the following causes, to-wit:
>
> 1. That it was misconduct for counsel for the State to ask the defendant in substance the following questions in the presence of the jury.
>
> a. Did you engage in any bootlegging at that time?
>
> b. Isn't it a fact that you used one of those buildings for a still?
>
> c. Did you purchase all of those residences from the proceeds of your dentistry practice?
>
> d. You owned a cottage in Casebeer Heights?
>
> e. Do you recall that cottage being raided by State agents?

That such questions were a persistent attempt, on the part of counsel for the State to degrade the defendant in the eyes and minds of the jurors and to inflame the jurors against

the defendant and such conduct was engaged in after repeated objections which were sustained by the Court. (Abs.. p. 316, lines 20 to 35, Abst. p. 317, lines 1 to 10)

In Appelant's Brief and Argument among the authorities relied upon for reversal is the following:

No person shall be deprived of life, liberty or property, without due process of the law.

Article 5, CONSTITUTION OF UNITED STATES

Sec. 9, Art. 1, CONSTITUTION OF IOWA

The inability to know how much the jury was influenced by the suggestions and insinuations in the foregoing questions deprived the petitioner of a fair and impartial trial in violation of the 5th and 14th Amendments of the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

1. There was no basis in the record for the questions put to the petitioner. It was an attempt on the part of the State to suggest to the jury that the petitioner had been guilty of unlawful conduct other than that alleged in the indictment. It is impossible to measure their effect upon the jury. To attempt to do so would be to indulge in speculation and conjecture. It cannot be known beyond a reasonable doubt that a verdict of guilty of manslaughter would have been returned against the petitioner in the absence of the suggestions and insinuations contained in those questions. The impossibility of knowing how much the jury was influenced by them in reaching a verdict vitiates the petitioner's conviction and constitutes a lack of due process of law. The petitioner was the only eye witness to the shooting of the decedent. His testimony, in absence of conflicting evidence, established that he acted in self defense. The State had no alternative but to rely on circumstantial evidence to raise an issue for the jury as to the defendant's

guilt. As the petitioner saw it, there were no such circumstances. As the record shows, it is exceedingly doubtful as to whether or not there were any such circumstances. This may help to understand why the suggestions and insinuations of other unlawful conduct were made. Be that as it may, their probable influence upon the jury was such as to deprive the petitioner of a fair and impartial trial in violation of the due process clause of the 5th and 14th amendments to the Constitution of the United States.

In Brooks v. **State**, 209 Miss. 150, 46 So. 2d 94 (1950), the defendant was convicted of assault and battery with intent to kill. The court ruled that under the law and the evidence, the jury could reach no other verdict than that of guilty, but overturned the verdict on constitutional grounds. The main ground for reversal was the use of self-incriminating evidence, but the court went on to say:

> "Besides in the cross-examination of Brooks, he was asked, 'This place of business you run is a bootlegging establishment, isn't it?' And, 'It is where you sell whiskey isn't it?' This was highly improper and prejudicial as showng guilt of another crime."

In **Oliver** v. **United States**, 202 F. 2d 521 (C. A. 6, 1953), the court ruled that cross-examination of the defendant, who was at trial on the charge of altering a forged check, as to whether he had not previously pleaded guilty to the charge and had been sentenced and then obtained leave to plead not guilty upon learning the extent of his sentence, constituted reversible error, notwithstanding immediate admonition by the district judge and a subsequent charge to the jury to disregard the question. The court quoted **Pierce** v. **United States**, 86 F. 2d 949 (C. A. 6, 1936), saying:

> "* * * in that case it was pointed out that no admonition from the court, however promptly and forcibly made,

that the jury should disregard statement of the U. S. attorney as to previous brushes with the law * * * could be safely relied upon to free the minds of jurors from the impression that the defendant was a bad character and capable of committing the crime charged. Such suggestions from the District Attorney were said to be capable of completely over-throwing the presumption of the defendant's innocence."

The question presented is important in that it affects all persons accused of crime. It is much more important in homicide cases where the penalty is imprisonment or in some States, including Iowa, death. If the instant case presented an isolated departure from the observance of due process, the propriety of granting certiorari might be doubtful, although it would seem that in any case in which the freedom or life of an individual is at stake, the granting of certiorari rather than its denial would be in accord with the common concept of the protection afforded to all persons by the due process clause of the Constitution of the United States . This is especially true where the evidence of guilt, if any, is weak, as it is in this case.

2. The evidence in the case was insufficient to sustain a verdict of guilty of manslaughter.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPEARANCE

I, William L. Beecher, a member of the Bar of the Supreme Court of the United States, do hereby enter my appearance as associate counsel for Frank A. Haffa, Petitioner.

WILLIAM L. BEECHER
404 First National Building,
Waterloo, Iowa

PROOF OF SERVICE

I, ..., Assistant Attorney General of the State of Iowa, hereby acknowledge receipt of a copy of the foregoing Petition to the United States Supreme Court for a Writ of Certiorari to the Supreme Court of the State of Iowa, this ..... day of October, 1955.

.....

APPENDIX A

5th Amendment of U. S. Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1, 14th Amendment of U. S. Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life; liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

Section 9, Article 1, Constitution of State of Iowa

Right of trial by jury -- due process of law.

Sec. 9 The right of trial by jury shall remain inviolate; but the General Assembly may authorize trial by a jury of a less number than twelve men in inferior courts; but no person shall be deprived of life, liberty, or property, without due process of law.

Section 793.15 Code of Iowa

Assignment of error. No assignment of error is necessary.

APPENDIX B

STATE OF IOWA, Appellee,

v.

FRANK A. HAFFA, Appellant.

No. 48479

Supreme Court of Iowa

June 7, 1955

Ralph W. Travis and Beecher & Beecher, Waterloo, for appellant.

Dayton Countryman, Atty. Gen., Raphael R. R. Dvorak, Asst. Atty. Gen., K. L. Kober, County Atty., and Wendell Holmes, Asst. County Atty., Waterloo, for appellee.

LARSON, Justice.

On July 9, 1953, the defendant Frank A. Haffa was indicted by the Grand Jury of Black Hawk County and accused therein of the crime of murder in the first degree. A plea of not guilty was entered on July 15, 1953, and trial to a jury commenced September 28, 1953, defendant was found guilty of the included offense of manslaughter and judgement entered accordingly. Defendant's motion for a new trial was overruled on November 25, 1953, and he was sentenced to imprisonment in the Iowa State Penitientiary at Fort Madison, Iowa, for not to exceed eight years, and to pay a fine of $1,000. From this judgement and sentence he appeals.

Arvey C. Leeper, a resident painter and former yardman employee of the defendant, died between 12:30 and 1:00 A.M. on June 7, 1953, from the effects of a bullet wound received about 9:30 P.M. Saturday, June 6, 1953, at the property located at 41 South Hackett Road in Waterloo, Iowa, in which Mrs. Haffa resided and which was owned by the defendant.

The defendant, at the time of the acts charged, was 72 years of age, a retired dentist, with his living quarters in the Walnut Court Apartments, a building housing 117 families, of which he was the acting manager. He also operated the Black Hawk Investment Company, owned considerable property, and acted as a receiver for bankrupt ladies' wear stores.

On June 6, 1953, defendant testified he received a telephone call from his wife at 41 South Hackett Road telling him she had received a call that "she didn't like", and as he had intended to take the clean laundry out there any way, he immediately drove to the house, a trip which took about fifteen minutes.

During the past year there had been some vandalism at 41 South Hackett Road which had been reported to the sheriff's office, and defendant had been instructed, when he received information on trespassers upon the property, to get out there as quickly as he could and find out who such persons were. Mrs. Haffa had been loaned a gun for her protection at one time by the deputy sheriff. This premise was a five-acre tract, completely fenced, with a steel gate on Hackett Road. There were several buildings on the grounds, including the house some 150 feet from the road and the garage some 200 feet from the gate. There were many trees and bushes on the grounds, two yard lights, and and eight-foot cement drive from the gate to the garage. The drive widened out to sixteen feet south of the south door of the residence to provide double parking. There was a large elm tree across the drive southeast of the south doorway.

When defendant arrived at these premises about 8:30 P.M. the gate was open and all yard lights were off. Only a low voltage bulb over the kitchen sink was lighted in the house. He testified he drove into the garage, took the laundry

into the house and visited with his wife for about thirty minutes. Then he told her to lock all doors and went out the east or back door to inspect the premises. He took a six-shot .38 caliber Colt police positive revolver loaded with steel-jacketed bullets from his car and went "to look around." He did not take a flashlight. It was about 9:30 P.M. when he saw a taxi stop in the driveway across the street and then turn around and go back the way it came. This taxi brought the decedent who had been drinking, but was not drunk. Defendant said shortly thereafter a man appeared at the back or east door, knocked and demanded admittance. When there was no answer from within, he kicked on the door and threatened to break in for some five minutes, and then walked on the drive south of the house to the south entrance, where he again tried to gain admittance. This doorway or porch entrance is approximately five by five and seven feet high. The sides are cement blocks, and four cement steps lead up to it, with wrought iron railings about three feet high on both sides of the steps. It was a very dark night. The defendant said from his hiding place behind the large elm tree he saw a human form go up into that porch entrance and heard him kick and pound on the door and demand entry to the house. After waiting four or five minutes defendant stepped from behind the tree and said he called out "This has gone on long enough. * * * Come down out of there." Almost immediately he fired two shots into the porch entrance. Their course through the door and interior of the house was traced by the officers, and the bullets recovered. The officers testified one bullet went through the door 10¾ inches to the left of the center as you face it, and 2 feet 6½ inches from the bottom. The other went through the door 7¾ inches to the right of the center and 4 feet 6½ inches from the bottom of the door. The defendant claimed he fired a warning shot into the

ground just before firing into the entrance, but that bullet was never found. None of these bullets hit the decedent, but he made haste out of the dark entrance and down the steps toward the defendant who had moved up almost across the cement drive. The fatal shot was fired after decedent reached the sidewalk, and this bullet struck him in the left arm in the medial aspect of the anterior portion of the shoulder. The bullet followed a downward and backward course of forty-five degrees to the vertical mid-bone of Leeper's body, passing through the left lobe of the lung and through the seventh thoracic vertebra. Two doctors testified that in order to receive the type of bullet wound that Leeper received, the gun would have to be discharged above Leeper's left shoulder at the same angle of forty-five degrees that the bullet followed after it entered the body. They also testified the severed spinal cord would have rendered Leeper immobile and would have caused him to drop in his tracks. In addition, Leeper had abrasions on the top part of his nose, upper lip, and on the right knee. His trousers had a tear in them at the right knee, which was not a bullet tear.

After the shooting, defendant called the officers and, when they arrived, Leeper was lying on his back partly on the grass to the right of the walk to the house, and partly on the driveway, feet southeasterly. The first statement made to the officers by defendant was: "That is the guy that threw rocks in my window," and then he said: "I shot once at his legs, and then he started at me, and I let him have it right in the face." When the decedent was viewed in the car lights, defendant acknowledged that he knew the fellow and that it was Slim Leeper. The decedent died in a Cedar Falls hospital without regaining consciousness. Certain photographs taken by one of the officers were admitted as exhibits. Two of them showed scuff marks on the south and east doors near the bottom, which defendant claimed were

made by Leeper's shoes. Mrs. Haffa did not leave the house that evening and did not testify in the trial.

The issues raised and argued by the defendant in the appeal are that the trial court erred (1) in overruling defendant's motion for a new trial for the reason that the alleged misconduct on the part of the assistant county attorney was shown to have prevented defendant from having a fair and impartial trial, (2) in overruling the defendant's motion for a directed verdict at the close of all evidence for the reason that the evidence failed to show as a matter of law that defendant did not act in self-defense at the time of the killing, and (3) in overruling defendant's motion to withdraw the charges of first and second-degree murder from the jury in that there was no evidence introduced in support of either of such charges.

It is the State's contention the facts, reasonable inferences and permissible presumptions disclose malice aforethought, deliberation, premeditation and an intent to kill. They point to the use of the deadly weapon upon the decedent in a darkened porch, the decedent's unsteady but understandable haste in getting out of the doorway, accounting for a fall down the steps explanatory of his face and knee injury, plus the time lapse between shots, the course of the fatal bullet through decedent's body and his position when found, as proof of defendant's aggression and as furnishing the necessary elements of first-degree murder upon which a verdict by the jury could be justified. While one may certainly use such reasonable force as necessary to repel an attack upon one's property and family, apparently this attack from the rear without adequate warning, this shooting-of-fish-in-a-barrel manner of defense, did not appeal to the jury. While under the testimony of the taxi driver who brought Leeper to the premises, watched him walk unsteadily into the driveway, and who stated Leeper was in a jovial mood and told him he was going out to see his girl friend, and other

similar evidence, the jury may have inferred that Leeper was not a prowler and was perhaps known to the defendant, it obviously believed a lesser verdict than first-degree murder was proper.

Other pertinent facts appear in the opinion.

(1) 1. Every person accused of a crime is entitled to a fair trial. It is so provided by the Constitution, statutes, and by general pronouncements of the courts. We have so announced many times and specific cases need not be cited. The State is also entitled to a fair trial. We have on many occasions reviewed matters where it was contended, as here, that there was misconduct on the part of the county attorney which deprived defendant of a fair trial.

(2) Mere misconduct of counsel however is not enough alone to require the granting of a new trial, unless it appears to have been so prejudicial as to deprive the complaining party of a fair trial. State v. Jensen, Iowa, 66 N.W.2d 480; State v. Warren, 242 Iowa 1176, 1189, 47 N.W.2d 221; State v. Wheelock, 218 Iowa 178, 254 N.W. 313. In State v. Cooper, 169 Iowa 571, 587, 151 N.W. 835, 841, we stated the rule often cited thereafter as:

"The rule is that mere misconduct of counsel is not enough alone to require the granting of a new trial, unless it appears to have been so prejudicial as to deprive the complaining party of a fair hearing of his case by the jury on the evidence."

We also said therein: "The trial court having heard all that took place on the trial, we ought not to interefere with his discretion in refusing a new trial," citing State v. Thomas, 135 Iowa 717, 109 N.W. 900; State v. Waterbury, 133 Iowa 135, 110 N.W. 328; State v. Norman, 135 Iowa 483, 113 N.W. 340; and State v. Wilson, 157 Iowa 698, 141 N.W. 337.

(3-5) It is true when the defendant submits himself as a witness he must answer in cross-examination on matters affecting his credibility as a witness, even though it may degrade him. The purpose of the cross-examination is to test the credibility of the witness and the accuracy of his knowledge of the subject matter. State v. Keul, 233 Iowa 852, 860, 861, 5 N.W. 2d 849. Of course the purpose of the cross-examination must be confined to discrediting the one examined as a witness and not as a defendant. It is the latter that defendant complains of herein. He contends at various times in the cross-examination of the defendant six different questions were improperly asked by the county attroney. After defendant related his various activities since retiring from dentistry, he was asked, "Did you engage in any bootlegging at any time?" He answered, "No, sir." Objection was made by defendant's counsel, overruled by the court, and then both the objection and ruling were withdrawn.

(6) When the defendant withdrew his objection to the question on bootlegging, he cannot raise such objection for the first time on appeal since there is nothing to review. State v. Duff, 144 Iowa 142, 122 N.W. 829, 24 L.R.A., N.S., 625. There is no trial court ruling for us to review. State v. Mauch, 236 Iowa 217, 17 N.W. 2d 536; State v. Thom, 236 Iowa 129, 17 N.W. 2d 96; State v. Tarr, 233 Iowa 659, 10 N.W.2d 55. In the latter case at page 662 of 233 Iowa, at page 57 of 10 N.W. 2d, we said we can "give no consideration to the merits or the demerits of the propositions of law, raised for the first time, in assignments of error on this appeal."

(7) The defendant was then asked to repeat the purpose for which he said the buildings on the premises were used, and he answered, "Storage." The county attorney then asked, "Isn't it a fact that you used one of those buildings for a still?" which was promptly objected to, and the objection properly sustained. oN answer was given and no motion

made to strike the question, admonish the jury, or declare a mistrial. Consequently there is no such error attributable to the court here as is found in the recently-decided case of State v. Collins, Iowa 69 N.W. 2d 31, which is strongly relied upon by the defendant for reversal.

(8) The next question listed related to defendant's profession and his property: "Did you purchase all these residences from the proceeds from your dentistry practice?" While the question undoubtedly is immaterial, we fail to find the implication degrading that he purchased these properties with funds deceived from other sources. Furthermore, defendant's objection was promplty sustained before answer. Few cases are tried that would not produce similar inquiries, and for us to find such attempts to elicit immaterial or incompetent testimony on cross-examination sufficient grounds for a new trial, would permit few verdicts to stand. We do not think it was prejudicial herein. See State v. Jensen, supra.

(9) At still another time defendant complains he was asked in cross-examination, after he had testified he owned a cottage in Casebeer Heights, "Do you recall that cottage being raided by state agents?" Objection was promptly made, sustained, and no answer received. Defendant contends the inference was that the property belonged to him when raided and that he was a party to the activity raided. The question was immaterial, though the State contended it was to test the memory of the witness, which usually is proper cross-examination. The court, at the request of the defendant, did "caution" the assistant county attorney to "keep in mind the purpose of the cross-examination * * *", and the matter was pursued no further. We do not believe asking the question was prejudicial.

(10) At a still later occasion the defendant objected to the question, "Did you ever deal in war surplus property in

Dallas, Texas?" as immaterial, irrelevant and improper cross-examination. The objection was sustained over the claim of the state it was examining as to defendant's business activities testified to in direct examination. We also fail to find prejudice to defendant by this question.

There was no error in any of the rulings of the trial court nor any request wrongfully denied defendant in relation to any of the cross-examination complained of, and we must therefore conclude any error for which reversal would be justified would come from a abuse of the court's discretion in denying the motion for a new trial on the alleged misconduct of the county attorney in asking the questions.

(11,12) As we have said many times, the granting of a new trial in such instances is largely within the discretion of the trial court. State v. Jensen, supra, and cases cited therein. If the county attorney acted in bad faith, and the action would likely distract from the issue in the case, the trial court was in proper position to know of it, and of course if it appears to have been so prejudicial as to deprive the complaining party of a fair trial or hearing by the jury on the evidence, a new trial must be granted.

(13, 14) We have examined the cases cited by defendant and most, if not all, relate to a persistent attempt to get improper information or answers to the same question from various witnesses, though the same or a similar question had been held improper by the court. State v. Poston, 199 Iowa 1073, 203 N.W. 257. Clearly such action would be in bad faith and disclose a prejudicial attempt on the part of counsel. For a clear example, also see State v. Hild, 240 Iowa, 1119, 1154, 39 N.W. 2d 139. Such is not the case before us, and we do not believe the questions complained of were improper to the extent that prejudice as a matter of law resulted therefrom. See State v. Neifert, 206 Iowa 384, 220 N.W. 32.

Defendant refers to our recent decision in the Collins case, supra, where we said the evidence of guilt was not strong, and where a motion for a mistrial was made, argued and overruled by the trial court. Said ruling was the basis of that appeal and the reversal. We think there are important distinctions between that case and the case at bar. Here there was no motion made for a mistrial, and in one instance even the objection was withdrawn, leaving no ruling upon which error could be predicated. Others were of little consequence and, while immaterial, did not clearly tend to discredit the defendant. Some related to matters testified to on direct examination, though not tending to confirm or deny any issues of this case. The question could, with possibly one exception, be tests of the memory and credibility of the witness, and such inquiries to a witness as a witness are proper. We fail to find as a matter of law that the questions, promptly objected to and sustained without answers, significantly detracted from the issues in this case or were effective in influencing the jury adversely to the defendant. The trial court was in the best position to observe and decide this question and we are not convinced there appeared prejudicial error in his ruling such as to justify a reversal on this ground.

(15) A fair trial does not necessarily mean an absolutely perfect trial. If such should be the rule, the prosecuting attorney would not dare to ask any question of a defendant which might be held incompetent or immaterial, and then he and not the court would be required to determine that question, and at his peril if the court should later determine when the question was asked that the evidence sought was inadmissible. We find no abuse of the trial court's discretion in denying the motion for a new trial due to alleged prejudicial misconduct of the county attorney in cross-examining defendant.

(16) II. Defendant also contends prejudicial error occurred, first during defendant's closing argument, and later during the State's closing argument. In his argument defendant referred to the State's failure to place in evidence the shoes worn by the decedent. Defendant claimed the exhibit picture showed damage to the right shoe due to kicking upon the doors of the residence. Also there was some inference that the county attorney has thus failed to perform "the duty of the State to introduce all evidence, whether it points to guilt or innocence." The prosecutor immediately produced some shoes and said, "May it please the Court, and Mr. Beecher, I have the shoes here. The State didn't introduce them because—". On objection by defense counsel to an explanation, the court said, "The objection is sustained" and "The State's attorney will have his opportunity to make his argument." In his final argument he attempted to explain why the shoes were not offered as exhibits, over the objection of defense counsel who claimed "counsel has no right here to discuss the shoes before this jury. They are not in evidence." We do not find the explanation was prejudicial to defendant. The objection to the offer of the State to stipulate that the shoes go into the record was properly sustained, and on the court's admonition the matter of the shoes was not again mentioned.

Here again we must repeat that we will not reverse a case or grant a new trial for statements made by the prosecutor during the course of trial unless the statements are prejudicial and deprive the defendant of a fair trial. In the case of State v. Dale, 225 Iowa 1254, 1257, 282 N.W. 715, 716, we said:

"Such matters are peculiarly within the discretion and power of the trial court, who is in a position to see and hear all that takes place on the trial, and this court should not interfere unless it appears that the alleged misconduct has

been so prejudicial as to deprive the defendant of a fair hearing."

See State v. Berlovich, 220 Iowa, 1288, 263 N.W 853. In State v. Stennett, 220 Iowa 388, 395, 260 N.W. 732, 736, we said:

"Complaint is also made against certain remarks made by the prosecuting attorney in his address to the jury. While the remarks in question are not to be commended and ought to be avoided, the question of whether they amount to misconduct such as to warrant a reversal is primarily for the presiding judge, and we are not disposed to hold them reversible error unless there is manifest abuse of discretion."

We find no such abuse in the court's denial of a new trial based on misconduct of the county attorney in his justifiable reply to defendant's inference of wilful secretion of evidence. We think the reply proper, and believe no prejudice resulted to defendant due to these remarks in final argument.

(17, 18) III. Defendant contends the evidence failed as a matter of law to show that he did not act in self-defense. The trial court, we think, properly overruled his motion to direct upon that ground. As we have often said, even in criminal cases, in passing on the motion to direct, we must view the record in the light most favorable to the State. State v. Hammer, Iowa, 66 N.W. 2d 490, 491; State v. Rutledge, 243 Iowa 179, 184, 47 N.W. 2d 251; State v. Williams, Iowa, 62 N.W. 2d 241. The case should be submitted to the jury if there is substantial evidence tending to support the charge. State v. Anderson, 239 Iowa 1118, 1125, 33 N.W.2d 1, 6.

In State v. Hammer, supra, we said at page 492 of 66 N.W.2d:

"It is only when the State's witnesses so contradict themselves as to destroy entirely the probative effect of their testimony we can say a question of law is generated."

(19-21) It must be conceded the Iowa rule is that the State must prove beyond a reasonable doubt that the accused did not act in self-defense. State v. Sedig, 235 Iowa 609, 16 N.W.2d 247, and cases cited therein. Self-defense is a defense which seeks to excuse or justify a killing. It is a doctrine of necessity. It has been correctly said, what particular facts will justify a killing is a question of law for the trial court, but whether such facts actually exist in a particular case is usually a question for the jury. 41 C.J.S., Homicide, Sec. 344, p. 108. There were no errors in the court's instructions relating to acts that would justify a killing.

(22) The rule is well settled, to justify homicide on the ground that it was committed in self-defense, four elements must be present: (1) the slayer must not be the aggressor in provoking or continuing the difficulty that resulted in the killing; (2) he must retreat as far as is reasonable and safe before taking his adversary's life, except in his home or place of business; (3) he must actually and honestly believe he is in imminent danger of death, great bodily harm, or some felony, and that it is necessary to take the life of his assailant to save himself therefrom; and (4) he must have reasonable grounds for such belief. State v. Holder, 237 Iowa 72, 20 N.W.2d 909; State v. Emery, 236 Iowa 60, 17 N.W.2d 854; 26 Am. Jur. 242, Homicide, Sec. 126. Our principal concern herein is the first element, and we shall discuss the testimony and circumstances relating to it. If the evidence justifies a finding that defendant is the aggressor, then the other elements need not be discussed and it is sufficient to say there appeared to be no retreat claimed. Rather it is claimed retreat was not required, but that reasonable grounds were apparent to justify defendant's fear of bodily injury which would justify the shooting. Defendant claims the fatal shot was fired through fear and not in a spirit of revenge, State

v. Bone, 114 Iowa 537, 547, 87 N.W. 507, but his first statement to the officers of "That is the guy that threw the rocks in my window" could be taken by the jury as indicative of the latter emotion.

(23) It is well settled that where the evidence is conflicting or of such a character that different inferences might reasonably be drawn, it is a question of fact for jury determination as to whether or not the defendant acted in self-defense. State v. Holder, supra.

(24, 25) We announced the rule applicable here in the case of State v. Sedig, supra, 235 Iowa 609, 16 N.W.2d 247, that where a defendant, who is the only living witness of a fatal shooting, interposes a plea of self-defense in justification of homicide, the State is not required to prove by direct evidence that the killing was not in self-defense, but may properly resort to circumstantial evidence. Also see State v. Burzette, 208 Iowa 818, 222 N.W. 394. It is the State's contention that the physical facts and circumstances in evidence show that the defendant armed himself and laid in wait for Leeper's appearance; that he did not carry a flashlight to learn the identity of the visitor as he was instructed to do by the sheriff; that he waited in the shadow of the tree until the visitor was in the vestibule doorway, and shot at him almost at once following his challenge to "come down out of there." How he came to miss the figure in the dark doorway even the sheriff could not understand. At any rate the State contends the circumstantial evidence shows Leeper came out of the enclosed doorway toward the defendant, which was the only way he could go, and in his haste to escape the bullets, fell down the steps, skinning his face and tearing his trousers at the knee; that when he tried to rise he was shot by the defendant and killed. The physical evidence tends to confirm that theory. The neighbors who heard the shots explained there was some time between the two shots

fired into the door and the last one which killed Leeper. This also tended to refute defendant's testimony that Leeper, with an oath, rushed in anger from the doorway, arms outstretched to crush defendant. The time thus required would not likely cover a period of time equal to the time it would take for the neighbor Ethel Strein to get out of her bed, get her slippers, go to her south window, and raise the shade and the window, between the next to the last and the last shot. The testimony of defendant as to the attempted break-in, the kicking and pounding and the language used by Leeper, may or may not have been believed by the jury. The defendant himself testified he had not ordered Leeper to stay off his property, but on the other hand had employed him on those premises off and on for about five years. From the circumstances shown, the jury could well have determined defendant knew Leeper's southern or Missouri drawl and intentionally became the aggressor, especially if it also found Leeper was prostrate before the defendant when he fired the fatal shot. Of course the weight to be given the testimony of the parties is determined by the jury itself. We think there were ample circumstances and physical facts shown by the State which would justify the submission of the question of self-defense to the jury and to substantiate its determination that the defendant did not reasonably act in self-defense.

IV. Defendant's final contention is that the trial court erred in submitting, for consideration by the jury, the crimes of first- and second-degree murder. As we said in the recent case of State v. Christie, 243 Iowa 1199, 1204, 53 N.W.2d 887, 889, 54 N.W.2d 927:

(26, 27) "The distinction between murder and manslaughter, and between first and second-degree murder are familiar. Any unlawful killing with malice aforethought is murder. State v. Leib, 198 Iowa 1315, 201 N.W. 29. To constitute murder in the first degree there must be the ad-

ditional elements of deliberation, premeditation and intent to kill. State v. Sipes, 202 Iowa 173, 209 N.W. 458, 47 A.L.R. 407, Fouts v. State, 4 G. Green 500."

(28) We should remember, in ruling on the motion to withdraw, the facts disclosed must be considered most favorable to the State.

(29, 30) Under the record evidence related, there was sufficient proof to raise the presumption of malice by the admitted use of the deadly weapon. State v. Fischer, Iowa 60 N.W.2d 105. Here as in the Christie case, supra, the argument is advanced that while that presumption is permissible, we may not go further and say that having thus found the intent we may therefrom draw the inference of deliberation and premeditation. In the Christie case we reviewed the case cited in support of this theory and rejected the argument. Much depends upon the facts and circumstances as to whether or not such a further inference is possible. Here also there were no eyewitnesses to the assault except the defendant himself. However, the facts and the circumstances do not necessarily show that Leeper was making an unwarranted attack on the defendant, or even his property. True, defendant claims Leeper kicked and pounded upon the doors and broke a latch, and submitted photos showing scratch marks on the doors, but there is no testimony as to their existing conditions prior to that time. No persons testified to hearing the alleged shouting, pounding and kicking, though they did hear the shots. It is elementary a mere trespasser is not making an unwarranted attack such as to justify the use of a deadly weapon upon his person or to kill him, and we need not here repeat the distinctions pointed out in the Christie case, supra, nor review the cases discussed therein, including the case of State v. Wilson, 234 Iowa 60, 11 N.W.2d 737, relied upon by the defendant. Though defendant contends he was justified in shooting to

prevent a breaking and entering into his home, we do not agree that the evidence discloses, as a matter of law, any more than a determined effort to arouse the occupant and obtain willing admittance. If there were more, such issue was for the jury to determine. The law will not, out of tenderness for human life and the frailties of human nature, permit the taking of it to repel a mere trespass, or even to save a live where the assault is provoked. Beard v. United States, 158 U.S. 550, 561, 15 S. Ct. 962, 39 L.Ed 1086. The evidence does not disclose a period of time between the last shot and the next to the last shot, which is not well explained by defendant. As before stated, the neighbor Ethel Strein had sufficient time, after she heard two shots come close together, to lie in her bed "probably half a minute", get out of bed, get her bedroom shoes and housecoat, then go over to the south window, and raise the shade and window, before she heard another shot, which was the final one. Ample time is shown for deliberation, premeditation, and the formation of an intent to kill.

While we have said many times the essential premeditation need not be of long duration, State v. Hofer, 238 Iowa 820, 834, 28 N.W.2d 475; State v Christie, supra, and cases cited threrein, there is no convincing evidence that there was a sudden emergency, decision or impulse responsible for the final shot that killed Leeper, indeed if there was any to justify the firing of the two shots into the dark doorway where Leeper stood.

We said in State v. Powell, 137 Iowa 1227, 1238, 45 N.W.2d 769, 775:

"The other elements of premeditation and deliberation are likewise provable by the facts and circumstances surrounding the homicide. We have said premeditation and deliberation need not exist for any particular length of time." (Citing cases.)

We also quoted with approval in the Christie case, supra, on page 1207 of 243 Iowa, on page 891 of 53 N.W.2d, from State v. Baker, 143 Iowa 224, 229, 230, 121 N.W. 1028, 1030, as follows:

" 'This court has never held that the trial judge could be required by motion to enter into a critical examination of the evidence, where the proof tended to show homicide by violence, with malice aforethought, for the purpose of determining whether in his opinion the act was deliberate and premeditated.' "

It may be conceded that there might be cases where the circumstances of the homicide were such that the court could say, as a matter of law, that there was no evidence of deliberation and premeditation, but this is the exceptional case and is not the case before us. The unexplained facial and knee injuries, the course of the bullet through the decedent's body, and the time lapse between shots, are ample evidence upon which a jury could find not only malice, but premeditation, deliberation, and intent to kill.

Here the defendent selected a deadly weapon loaded with steel-jacketed shells, instead of a flashlight, and the jury could well find he went to shoot and not to discover the identity of any prowler as he was asked to do by the sheriff.

We have even said under certain circumstances it is proper to submit the question of first-degree murder to the jury although there is no specific proof of deliberation and premeditation apart from the proof of the violent infliction of a mortal wound. State v. Baker, supra. Also see State v. Heinz, 223 Iowa 1241, 1258, 1259, 275 N.W. 10, 12, 114 A.L.R. 959.

As pointed out by Judge Smith in the Christie case, supra, this is not making one inference the basis of another, but instead recognizes the fact that deliberation, premedita-

tion, and specific intent to kill, as is true of mental processes generally, are not ordinarily susceptible of direct proof but must be deduced from words, conduct and circumstances accompanying them.

There is no explanation by defendant of Leeper's facial injury. He was lying face up when found by the officers, giving some inference he fell backward when shot, as he might well do if hit "in the face" while rising, and would not likely do if shot "in the face" while charging head down toward defendant.

(31) It was for the jury to determine under appropriate instructions, of which in the case at bar no error is alleged or argued, whether or not there was premeditation, deliberation, and specific intent to kill, and therefore the court was correct in refusing to withdraw from the jury the issues of first- and second-degree murder.

From a very careful examination of the whole record we conclude defendant had a fair trial and that the judgement and sentence should be affirmed.

Affirmed.

All Justices concur.

APPENDIX C

Paragraph 6 of Petitioner's Motion for New Trial

6. That the defendant has not received a fair and impartial trial for the following causes, to-wit:

1. That it was misconduct for counsel for the State to ask the defendant in substance the following questions in the presence of the jury.

a. Did you engage in any bootlegging at that time?

b. Isn't it a fact that you used one of those buildings for a still?

c. Did you purchase all of those residences from the proceeds of your dentistry practice?

d. You owned a cottage at Casebeer Heights?

e. Do you recall that cottage being raided by State agents?

That such questions were a persistent attempt on the part of counsel for the State to degrade the defendent in the eyes and minds of the jurors and to inflame the jurors against the defendant and such conduct was engaged in after repeated objections which were sustained by the Court.

2. That it was misconduct for counsel for the State to state in argument to the jury that "Leeper said — he told the cab driver where he was going. That he was going out to see his girl," for the reason that said statement was made without qualification despite an ample record having been made in the trial of the cause restricting the use of such testimony. That said argument was made for the purpose of supplying a motive for the killing despite the fact the Court had ruled said evidence inadmissible for such purpose.

3. That it was misconduct for counsel for the State to display a pair of shoes, not admitted in evidence, to

the jury during defendant's argument and to attempt to explain why the shoes of the defendant were not introduced into evidence. That such attempt was an irregular and improper method of presenting evidence to the jury, was prejudicial to the defendant and prevented him from having a fair and impartial trial.

4. That it was misconduct for counsel for the State to explain, in the State's closing argument, why the shoes of the decedent were not introduced into evidence and to state the following: "Mr. Beecher knew these clothing, shirt, coat, trousers and necktie were kept from the body of Leeper, the other articles, hat and shoes were given to other parties."

That said statement was in the nature of testimony not under oath and highly prejudicial to the defendant.

That it was error for the Court to overrule the defendant's objection to the remarks of State's counsel in his closing argument, which argument was substantially as follows: "Also there was remarks about shoes. Mr. Beecher knew these clothing, shirt, coat, trousers and necktie were kept from the body of Leeper, the other articles, hat and shoes were given to other parties." Mr. Beecher: "We object to remarks of counsel for rebuttal, prejudicial to the rights of the defendant." Mr. Holmes: "Mr. Beecher opened it up."

Court: Overruled.

That it was error for the Court to overrule said objections as the jury was thereby allowed to consider the remarks of counsel as evidence although no evidence was received in that respect during the trial of the cause. That said ruling was prejudicial to the rights of the defendant and prevented him from receiving a fair and impartial trial.

6. That it was misconduct for counsel for the State in final argument to state in substance as follows: Mr.

Kober: In regard to the **shoes** Mr. Beecher mentioned, the State would gladly stipulate they go into the record if the State —

Mr. Beecher: Just a minute—

Mr. Kober: could have have tied up the possesion of the shoes.

Mr. Beecher: Your Honor, that is not proper argument before the jury, the defendant does not have to stipulate on anything.

That such conduct was an effort to get an improper matter before the jury and was prejudicial to the rights of the defendant.

7. That was misconduct for counsel for the State to persistently call witnesses and ask questions attempting to establish a relationship between the deceased and and the wife of the defendant a record having been made showing that such relationship, if it even existed, was unknown to the defendant and evidence thereof was clearly inadmissible in the trial of this cause.

That said conduct by innuendo and insinuation from the form of the question informed the jury of improper matters and was prejudicial to the rights of the defendant.

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CITATIONS

State Decisions:

State v. Cooper, 169 Iowa 571, 587, 151 N. W. 835, 841.

State v. Duff, 144 Iowa 142, 122 N. W. 829, 24 L.R.A. (N.S.) 625.

State v. Jensen, 245 Iowa 1363, 66 N. W. 2d 480.

State v. Mauch, 236 Iowa 217, 17 N. W. 2d 536.

State v. Tarr, 233 Iowa 659, 10 N. W. 2d 55.

State v. Thom, 236 Iowa 129, 17 N. W. 2d 96.

State v. Warren, 242 Iowa 1176, 47 N. W. 2d 221.

State v. Wheelock, 218 Iowa 178, 254 N. W. 313.

Federal Decisions:

Allen v. Arguimbau, 198 U. S. 149, 49 L. ed. 990, 25 S. Ct. 622.

Crowell v. Randell, 10 Pet. (U. S.) 368, 9 L. ed. 458.

De Saussure v. Gaillard, 127 U. S. 216, 32 L. ed. 125, 8 S. Ct. 1053.

Johnson v. Risk, 137 U. S. 300, 34 L. ed. 683, 11 S. Ct. 111.

Lynch et al. v. New York ex rel. Pierson, 293 U. S. 52, 79 L. ed. 191, 55 S. Ct. 16, and cases cited therein.

Ocean Ins. Co. v. Polleys, 13 Pet. (U. S.) 157, 10 L. ed. 645.

Stein v. New York, 346 U. S. 156, 97 L. ed. 1522, 73 S. Ct. 1077.

Whitney v. California, 274 U. S. 357, 71 L. ed. 1095, 47 S. Ct. 641.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 477

FRANK A. HAFFA,
Petitioner,

vs.

STATE OF IOWA,
Respondent.

BRIEF IN BEHALF OF STATE OF IOWA, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE.

Petitioner, Frank A. Haffa, was indicted by the Grand Jury of Black Hawk County, Iowa, and accused of the crime of murder in the first degree. After trial to a jury, petitioner was found guilty of the included offense of manslaughter and judgment entered accordingly. An appeal

was perfected to the Supreme Court of Iowa, which on the 7th day of June, 1955, affirmed the judgment and sentence of the lower court that petitioner be imprisoned in the Iowa State Penitentiary for not to exceed eight years and to pay a fine of $1,000.00, the opinion of the Supreme Court of Iowa being reported in 71 N. W. 2d 35. Subsequently and within the time required by law petition for rehearing was filed by petitioner, and resistance thereto filed by the State. Rehearing was denied on the 27th day of July, 1955, and the case is now pending in this Court upon petition for writ of certiorari.

Petitioner assigns as his chief ground for relief the alleged misconduct of the assistant county attorney during the cross examination of petitioner.

ARGUMENT.

RESPONDENT ASSERTS THAT THE RECORD FAILS TO SHOW THAT THE ASSISTANT COUNTY ATTORNEY WAS GUILTY OF SUCH MISCONDUCT IN HIS CROSS-EXAMINATION OF THE PETITIONER AS TO DEPRIVE HIM OF A FAIR AND IMPARTIAL TRIAL IN THIS CASE. THE DETERMINATION OF THIS QUESTION WAS FOR THE TRIAL COURT IN RULING UPON PETITIONER'S MOTION FOR A NEW TRIAL, AND THE TRIAL COURT FOUND ADVERSELY TO THIS PETITIONER. THE APPELLATE TRIBUNAL FOUND AND DETERMINED THAT IN SO RULING UPON SAID QUESTION THE TRIAL COURT DID NOT ABUSE ITS DISCRETION. CLEARLY, THE ORDER OF THE TRIAL COURT OVERRULING THE MOTION FOR A NEW TRIAL ON THE GROUND OF THE ALLEGED MISCONDUCT OF THE ASSISTANT COUNTY ATTORNEY AND THE AFFIRMANCE OF SUCH ORDER BY THE SUPREME COURT IS NOT A FEDERAL QUESTION AND THEREFORE THIS COURT HAS NO JURISDICTION TO HEAR AND DETERMINE THE ISSUES INVOLVED HEREIN.

In his petition for writ of certiorari, petitioner contends that at various times in his cross-examination three differ-

ent questions were improperly asked by the assistant county attorney.

After petitioner had related his various activities after retiring from the practice of dentistry, he was asked, "Did you engage in any bootlegging at any time?", to which he answered, "No, sir." Objection was made by petitioner's counsel, overruled by the court and then both the objection and the ruling were withdrawn. Thus when the petitioner withdrew his objection to the question on bootlegging, there was left no ruling of the trial court upon which error on appeal could be predicated, and under the Iowa decisions such an objection could not be raised for the first time on appeal. *State v. Duff*, 144 Iowa 142, 122 N. W. 829, 24 L. R. A. (N. S.) 625; *State v. Mauch*, 236 Iowa 217, 17 N. W. 2d 536; *State v. Thom*, 236 Iowa 129, 17 N. W. 2d 96; *State v. Tarr*, 233 Iowa 659, 10 N. W. 2d 55.

The petitioner was then asked to repeat the purpose for which he said the buildings on his premises were used and he answered, without objection on his part, "Storage." The assistant county attorney then asked, "Isn't it a fact that you used one of those buildings for a still?", which was promptly objected to, and the objection promptly sustained. Petitioner gave no answer and no motion was made to strike the question, to admonish the jury, or to declare a mistrial.

Subsequently, after petitioner had testified he owned a cottage in Casebeer Heights, he was asked, "Do you recall that cottage being raided by state agents?". Objection was promptly made, sustained, and again no answer received. The court, at the request of the petitioner, did caution the assistant county attorney to "keep in mind the purpose of the cross-examination," and the matter was pursued no further by the assistant county attorney.

This therefore embraces the entire record of alleged

misconduct on which petitioner is basing his request for your review of the Iowa Supreme Court's decision.

Under the Iowa decisions mere misconduct of counsel is not enough alone to require the granting of a new trial unless it appears to be so prejudicial as to deprive the complaining party of a fair trial. *State v. Jensen*, 245 Iowa 1363, 66 N. W. 2d 480; *State v. Warren*, 242 Iowa 1176, 47 N. W. 2d 221; *State v. Wheelock*, 218 Iowa 178, 254 N. W. 313; *State v. Cooper*, 169 Iowa 571, 587, 151 N. W. 835, 841. Our highest court has said many times that the granting of a new trial in such instances is largely within the discretion of the trial court. *State v. Jensen, supra*, and cases cited therein. If the assistant county attorney acted in bad faith, and the action would likely distract from the issues in the case, the trial court was in the best position to observe and decide this question. The trial court in its ruling on petitioner's motion for a new trial expressly found and determined that no misconduct which in any manner prejudiced the rights of the petitioner had been committed by the assistant county attorney. The Iowa Supreme Court, after careful review of petitioner's complaints and the trial court's ruling on his motion for a new trial, determined that it was unable to find as a matter of law that the now condemned questions, promptly objected to and sustained without answers, significantly detracted from the issues in the case or were effective in influencing the jury adversely to the petitioner, and found no abuse of the trial court's discretion in denying the motion for new trial due to the alleged prejudicial misconduct of the assistant county attorney in cross-examining the petitioner.

It is essential to the jurisdiction of this Court on certiorari to a state court that it appear affirmatively from the record not only that a Federal question was presented for decision in that Court, but also that its decision of the Federal question was necessary to the determination of

the cause, and that the question was actually decided or that the judgment as rendered could not have been rendered without deciding it. *Lynch et al. v. New York ex rel. Pierson*, 293 U. S. 52, 79 L. ed. 191, 55 S. Ct. 16, and cases cited therein; *Whitney v. California*, 274 U. S. 357, 71 L. ed. 1095, 47 S. Ct. 641; *Allen v. Arguimbau*, 198 U. S. 149, 49 L. ed. 990, 25 S. Ct. 622; *Johnson v. Risk*, 137 U. S. 300, 34 L. ed. 683, 11 S. Ct. 111; *De Saussure v. Gaillard*, 127 U. S. 216, 32 L. ed. 125, 8 S. Ct. 1053; *Ocean Ins. Co. v. Polleys*, 13 Pet. (U. S.) 157, 10 L. ed. 645; *Crowell v. Randell*, 10 Pet. (U. S.) 368, 9 L. ed. 458.

In the case at bar the question here presented that the assistant county attorney's action was such as to deprive the petitioner of a fair and proper trial in violation of the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States was never argued or urged to the highest court of this state. No effort was made in that Court to support the contention upon which the petition herein is based, other than a bare citation of the Fifth Amendment as an authority under a brief point which was not elaborated upon in petitioner's opening brief to that Court. The decision of the Supreme Court of Iowa rests upon non-federal grounds which were adequate to support it. Here for the first time petitioner attempts to raise the question of his Federal constitutional rights under the Fourteenth Amendment. The Supreme Court of Iowa was not asked to pass upon and did not pass upon this question.

The Iowa cases cited by petitioner for the most part relate to a persistent attempt to get improper information or answers to the same questions or from various witnesses though the same or similar questions had been held improper by the court (*State v. Collins*, ... Iowa ..., 69 N. W. 2d 31; *State v. Burris*, 198 Iowa 1196, 199 N. W. 290; *State v. Scott*, 194 Iowa 777, 188 N. W. 970; *State v. Roscum*,

119 Iowa 330, 92 N. W. 680), and the Federal cases cited by him involve misconduct on the part of a Federal District Attorney (*Oliver v. United States*, 202 F. 2d 521; *Pierce v. United States*, 86 F. 2d 949). Neither are applicable to the case before us.

THE APPELLATE TRIBUNAL FOUND AND DETERMINED THAT THE EVIDENCE IN THE CASE WAS SUFFICIENT TO SUSTAIN THE VERDICT OF GUILTY OF MANSLAUGHTER RETURNED BY THE JURY.

As to petitioner's second proposition that the evidence in the case was insufficient to sustain a verdict of guilty of manslaughter, a proposition which he fails to argue in his petition, may we merely state that it is only miscarriages of such gravity and magnitude that they cannot be expected to happen in an enlightened system of justice, or be tolerated by it if they do, that cause the United States Supreme Court to intervene to review, in the name of the Federal Constitution, the weight of conflicting evidence to support a decision by a state court. *Stein v. New York*, 346 U. S. 156, 97 L. ed. 1522, 73 S. Ct. 1077.

CONCLUSION

For the foregoing reasons we respectfully request that petitioner's petition for writ of certiorari be denied.

Respectfully submitted,

DAYTON COUNTRYMAN,
Attorney General of Iowa.
State House,
Des Moines, Iowa,
RAPHAEL R. R. DVORAK,
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Attorneys for State of Iowa,
Respondent.

APPEARANCE.

I, Neill Garrett, a member of the Bar of the Supreme Court of the United States, do hereby enter my appearance as associate counsel for the State of Iowa, Respondent.

NEILL GARRETT,
404 Equitable Building,
Des Moines, Iowa.

PROOF OF SERVICE.

I, William L. Beecher, Attorney for Petitioner Frank A. Haffa, hereby acknowledge receipt of a copy of the foregoing Brief in Behalf of State of Iowa, Respondent, in Opposition to Petition for Writ of Certiorari, this ..... day of November, 1955.

.....